

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| LENORE ROSEN | : | |
| | : | DETERMINATION |
| | : | DTA NO. 817971 |
| for Redetermination of a Deficiency or for Refund of | : | |
| New York State and New York City Personal Income | : | |
| Taxes Under Article 22 of the Tax Law and the New York | : | |
| City Administrative Code for the Year 1996. | : | |

Petitioner, Lenore Rosen, 3267 Durham Place, Holland, Pennsylvania 18966, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 1996.

On December 5, 2000, the Division of Taxation filed a motion for an order dismissing the petition and granting summary determination to the Division of Taxation on the grounds that there are no material issues of fact and that the facts mandate a determination in favor of the Division of Taxation. Petitioner, who appears by Herman Rosen, filed no response to the motion. The Division of Taxation appears by Barbara G. Billet, Esq. (Barbara J. Russo, Esq., of counsel). Based on the pleadings and motion papers, Jean Corigliano, Administrative Law Judge, renders the following determination.

ISSUE

Whether interest imposed on a tax deficiency may be canceled based on petitioner's contention that the Division of Taxation delayed in assessing the deficiency.

FINDINGS OF FACT

1. Petitioner, Lenore Rosen, filed a 1996 New York State and City nonresident and part-year resident personal income tax return on or before April 15, 1997.

2. The Division of Taxation (“Division”) received information from the Internal Revenue Service (“IRS”) which showed that petitioner had neglected to subtract state and local income taxes paid to New York from her Federal itemized deduction when computing her New York itemized deductions. This information was provided to the Division through the Federal Information Exchange program.

3. Based on the IRS information, the Division issued to petitioner a Statement of Proposed Audit Adjustment, dated June 18, 1999, where it recomputed petitioner’s 1996 itemized deductions. New York State and City taxes of \$5,178.00 were subtracted from Federal itemized deductions of \$22,627.00, and a New York City modification of \$79.00 was added to the result to calculate New York itemized deductions of \$17,528.00. The decrease in itemized deductions resulted in an increase in New York State and City taxable income and a tax due of \$261.00. In addition to the tax due, the Division calculated interest due in the amount of \$45.10. The statement advised petitioner that if a response to the statement was not received by the Division by July 18, 1999, a notice of deficiency would be issued.

4. Inasmuch as petitioner did not respond to the statement, the Division issued to petitioner a Notice of Deficiency, dated October 4, 1999, asserting tax due for 1996 of \$261.00 plus interest in the amount of \$51.51.

5. Petitioner filed a request for a Conciliation Conference, dated October 17, 1999, where she admitted to owing the tax due but objected to the imposition of interest on the tax due. She argued that New York State was delinquent in not correcting her mistake sooner and that she

should not be charged interest because the State was slow in acting. She also argued that the tax instructions were not clear. Petitioner stated that she would not be able to attend a hearing or conference since she lives in Pennsylvania.

6. By letter dated December 13, 1999, the Division denied petitioner's request for cancellation of interest. This letter explains the Division's calculation of tax due in detail. In addition, the letter states:

No penalties have been imposed on this bill. However, interest is due on the unpaid amount from the due date of the return to the date the full amount is paid. Interest is required by section 684(a) of the New York State Tax Law.

7. Petitioner executed a "Conditional" withdrawal of her request for conciliation conference. In an attachment, petitioner again argued that she should not be subject to payment of interest which she characterized as a penalty. The Division then issued a Conciliation Order, dated June 2, 2000, sustaining the statutory notice.

8. Petitioner submitted a petition for a hearing on August 11, 2000. Petitioner concedes that she erroneously neglected to subtract state and local taxes from her itemized Federal deductions. However, she argues that the Division had a responsibility to find the error on her return promptly and further states: "NYS is not a credit company which collects penalties and interest by waiting to collect and profit by it. The error should have been corrected and submitted to me in 1997" (original all in capital letters). Petitioner also suggests that a statute of limitations must apply.

CONCLUSIONS OF LAW

A. To obtain summary determination, the moving party must submit an affidavit, made by a person having knowledge of the facts, a copy of the pleadings and other available proof. The documents must show that there is no material issue of fact and that the facts mandate a

determination in the moving party's favor (20 NYCRR 3000.9[b][1]). Here, there are no facts in dispute. Petitioner admits owing the tax asserted by the Division. The only issue is whether the Division was correct in assessing interest as well as tax. Since there are no facts in dispute, this issue may be decided as a matter of law.

B. Tax Law § 684(a) provides, in pertinent part: “If any amount of income tax is not paid on or before the last date prescribed in this article for payment, interest on such amount . . . shall be paid for the period from such last date to the date paid, whether or not any extension of time for payment was granted.” Pursuant to Tax Law § 3008, the Commissioner of Taxation and Finance may abate all or part of interest owed on a final determination of tax due where the deficiency is attributable in whole or part to an unreasonable error or delay by an employee of the Division.

C. In this case, the interest imposed on the tax deficiency is not a result of any error or delay by anyone in the Division. Petitioner filed her 1996 income tax return on or about April 15, 1997. The Division was not aware of petitioner’s error in calculating her New York itemized deductions until it received information from the IRS. That information then had to be compared with petitioner’s actual tax return and the tax due from petitioner had to be calculated based on the IRS information. This process was completed and a Statement of Audit Adjustment was issued to petitioner on June 18, 1999. The time it took for these events to occur, slightly over two years, is not unreasonable under the circumstances. The interest imposed is mandated by Tax Law § 684(a), and there are no grounds for abating interest.

D. Petitioner argues in her petition that a statute of limitations may prohibit assessment of tax. There is no such prohibition. A Notice of Deficiency was issued to petitioner within three years of the filing of petitioner’s 1996 return as required by Tax Law § 683. At this point,

almost four years have elapsed since petitioner filed her 1996 return, but two of these four years have been consumed by petitioner's challenge to the imposition of interest.

E. As the Division has noted, the imposition of interest is not a penalty. The Tax Appeals Tribunal has explained the imposition of interest as follows:

Failure to remit tax gives that taxpayer the use of funds which do not belong to him or her, and deprives the State of funds which belong to it. Interest is imposed on outstanding amounts of tax due to compensate the State for its inability to use the funds and to encourage timely remittance of tax due. (*Matter of Rizzo*, Tax Appeals Tribunal, May 13, 1993).

F. The petition of Lenore Rosen is denied, and the Notice of Deficiency issued on October 4, 1999 is sustained.

DATED: Troy, New York
February 15, 2001

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE